Supreme Court, U.S.
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No.

In the

# Supreme Court of the United States

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PATRICIA J. MATASSARIN EX REL.,

*Petitioner,*

*versus*

F. F. MIKE LYNCH ET AL.,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

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## PETITION FOR A WRIT OF CERTIORARI

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Patricia J. Matassarin
*Counsel of Record*
2810 Whisper Fawn
San Antonio, Texas 78230
Telephone: (210)493-3844

Curry & Taylor (202) 393-4141/ussupremecourt@hotmail.com

57pp

## QUESTIONS PRESENTED FOR REVIEW

I. Is the Federal Judiciary in jeopardy of losing its credibility concerning its willingness to adequately "police" its own?

II. Have the Constitutional mandates of "Due Process" and "Equal Protection" become mere legal fictions in the Fifth Circuit?

## LIST OF PARTIES TO THE PROCEEDING:

Patricia J. Matassarin, individually, and for and on behalf of The Great Empire Broadcasting Employee Stock Ownership Plan and its Beneficiaries; for an on behalf of that class of persons, participants and/or beneficiaries of The Great Empire Broadcasting Employee Stock Ownership Plan, past or present, defrauded.

Plaintiff(s)/Appellant(s)/Petitioner(s)

F.F. Mike Lynch, individually and as Trustee for The Great Empire Broadcasting Employee Stock Ownership Plan (ESOP); Michael C. Oatman, individually and as Trustee for The Great Empire Broadcasting Employee Stock Ownership Plan (ESOP); Danny E. Jenkins, individually and as former Trustee of the ESOP and Agent of the Trustees and Agent of the Administrator of The Great Empire Broadcasting Employee Stock Ownership Plan; Great Empire Broadcasting, Inc., individually and as a Plan Administrator for The Great Empire Broadcasting Employee Stock Ownership Plan; The Great Empire Broadcasting Employee Stock Ownership Plan "Administrative Committee"; Karen K. Warner, Don T. Burford, and Curtis W. Brown individually and as a members of the Great Empire Broadcasting Employee Stock Ownership Plan "Administrative Committee"; Menke & Associates, Inc.

Defendants/Appellees/Respondents

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## OPINIONS BELOW

A decision of the United States Court of Appeals for the Fifth Circuit was issued on April 27, 1999 reported as Matassarin v. Lynch et al, 174 F.3d 549 (5th Cir. 1999), hereinafter referred to as Matassarin I. A Petition for Writ of Certiorari, case No. 99-630 was filed and subsequently denied by the United States Supreme Court on January 19, 2000. The initial appeal did not address an award of fees against Matassarin and in favor of the Defendant fiduciaries in the amount of $113,000.00. This appeal involves the affirmation by the Fifth Circuit of the fee award which was presented as a separate appeal. The opinion affirming the award was filed on February 28, 2000. A copy is included herewith at pg. 1a. A Petition for En Banc Review was denied on March 31, 2000. A copy of the denial of en banc review is included herewith at pg. 28a.

## STATEMENT OF THE BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT

Appellate Jurisdiction in the United States Supreme Court is conferred by virtue of 28 U.S.C § 1254. Jurisdiction in the lower United States District Court for the Western District of Texas, San Antonio, was conferred by ERISA, 29 U.S.. § 1001 et seq.

## STATUTORY PROVISIONS INVOLVED

29 USCS § 1132. Civil enforcement

(g)Attorney's fees and costs; awards in actions involving delinquent contributions.

(1)In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or

fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

## STATEMENT OF THE CASE

Plaintiff/Appellant/Petitioner, hereafter Petitioner, filed suit individually and in a representative capacity to recover the true value of stock held by sixty eight people in the Great Empire Broadcasting Inc. Employee Stock Ownership Plan (hereinafter the "Plan"or "ESOP"). She contended that the Defendants violated the provisions of the ESOP Plan, ERISA and the Tax Code and Federal and State Securities provisions in establishing "segregated investment accounts" for herself and sixty seven "terminated" participants and that the Defendant fiduciaries intentionally alienated participants' and beneficiaries' benefits, undervalued benefits, financially gained from the undervaluation, breached their fiduciary duties and engaged in self dealing. The District Court eventually dismissed all of Petitioners' claims on Summary Judgment.

Thereafter, an Appeal was taken to the Fifth Circuit Court of Appeals. The Appellate Court affirmed the District Court in all respects in a published opinion filed on April 27, 1999. A Petition for Writ of Certiorari was denied on January 19, 2000.

Erisa Violations:

The Court of Appeals opined that even though a "qualified" domestic relations order (hereinafter "Q"DRO) mandated action which the Court found was "out of line from the greater goals of ERISA", that nonetheless the "Q"DRO controlled and the administrators were bound to follow its terms The QDRO format was drafted by the Plan Administrator who mandated the language used as necessary to "qualify" the DRO under the terms of the Plan

document(s). The Plan Administrators interpreted the "Q"DRO to require that the value of Petitioner's stock was to be frozen at the time of her divorce from Danny Jenkins, ( then the Plan Administrator) on October 15, 1991; that the 1990 year-end valuation of $22.00 per share was to be applied to the 520.086 shares held by her; and that the amount total was to "accumulate" interest from 1991 until the time of Petitioner's retirement in or around 2015. No actual account was established, rather the "segregated investment account" was an accounting entry only.

Petitioner's stock and the stock of the sixty seven "terminated" participants had been taken from their individual, allocated and accrued "Company Stock Accounts" at the time of the divorce or termination from employment, and placed in a "suspense account" from which other active participants, including the fiduciary Defendants, purchased the stock at greatly reduced prices. For example, in 1995 approximately 13,000 shares of stock which had been originally allocated to the individual "Company Stock Accounts" of Petitioner and the others, was taken from a "suspense account" and purchased by the Defendants and other "active" participants at rates ranging from $22.00 per share to $33.00 per share, despite the 1994 year-end value being $50.25. The "segregated investment account" holders who took distributions in 1995 were told that the lower valuations applied to their benefit. The fiduciary Defendants knew the stock was worth $50.25, when they informed terminated participants in 1995 that the stock value ranged between $22 and $ 33 per share. The Court of Appeals did not adjudicate as to the propriety of the handling of the terminated participants accounts, because the Court found that Petitioner was an unsuitable representative. The Court, then reasoned that the "interest only" scenario pertaining to Petitioner's accounts did not violate the Prudent Person Investment Diversification Requirement argued by

Petitioner to be mandated by ERISA and other circuit precedent. Moreover, the Plan Document in existence at the time of a proposed distribution to Petitioner in 1995, required that her account be "treated the same as the affected accounts of the participant". The accounts of the participant, Danny Jenkins, indicated that his stock was valued year-end 1994 at $50.25 per share not the $22.00 per share that was offered to Petitioner and others. In addition, F.F. Mike Lynch had demanded and received from the ESOP $50.25 per share for 31,032 shares of stock that he sold to the ESOP in December, 1994. Six months later, however, he as Trustee, offered only a fraction of that amount to Terminated participants and beneficiaries. Jenkins' stock has continued to increase in value, as has the stock of Lynch, Oatman, Burford, Brown and Warner. Petitioner's stock, however, continues to be valued at the 1990 rate.

The stock has now increased to somewhere between $76.00 and $136.00 per share. Nonetheless, Petitioner's account was ordered to remain a "cash" account instead of a "stock" account and it is relegated to accumulating simple interest for twenty four years, despite the fact that all other "active" accounts are being given the benefit of the substantial increase in the value of the stock.

The Defendants maintained for a period from May, 1995 through March, 1996 that Petitioner was entitled to a "distribution". After the matter had been litigated for approximately ten months, the Defendants changed their position and argued that Petitioner was not entitled to a "distribution". Defendants also failed to offer "distribution" of the benefit in the form of stock, which is required under the Tax Code and which is made a specific provision in the Plan Documents. The Court of Appeals found this violation to be a mere oversight.

Class Representation:

The Court of Appeals opined that Patricia Matassarin was precluded from acting as a representative for the Class of sixty eight defrauded participants because she is an attorney and prosecuting the case and thus, there existed an actual or potential conflict of interest. The Court also embraced a "gender biased" finding of the District Court, by opining that the determination by Judge Prado that Petitioner "might be more interested in hurting her ex-husband than in ensuring adequate representation for a class" was not an abuse of discretion. Petitioner strenuously objected to the conclusion as being without any evidentiary basis.

Federal Securities Fraud:

The Court of Appeals upheld the District Court finding that Federal Securities Fraud claims were foreclosed because the ESOP Plan was " . . . not a voluntary investment choice, but instead a mandatory, employer-funded program." Petitioner argued that the ESOP Plan was both "voluntary" and "contributory" as a matter of fact and law and as a result, the reasoning applied in Uselton v. Commercial Lovelace Motor Freight, 940 F.2d 564 (10th Cir. 1991) should apply, emphasizing that the lack of punitive damages under

6.

ERISA encourages breach of fiduciary duty and self dealing and eliminates a pool of adequate representation.

Recusal:

The Court of Appeals found that the District Court Judge's refusal to recuse himself was reasonable. Petitioner argued that three written Orders reflected that the Judge engaged in ex parte, extra judicial communications, resulting in pejorative, demeaning and wrongful accusations against Petitioner personally, which were made a matter of record. Petitioner also complained that Judge Prado refused to allow her adequate time for discovery and that he failed to enter a

Scheduling Order (despite having required the parties to submit a proposed order) resulting in a premature series of summary dismissals of her various causes of action. Petitioner asserted that the written documentation, the failure to allow adequate discovery, the failure to enter a Scheduling Order, and the Judge's gender biased conclusions indicated, at the very least, "objective" bias/prejudice under Liteky v.U.S., 114 S.Ct. 1147 (1994) and that Due Process considerations mandated that Judge Prado recuse himself.

Fee Award Against Matassarin:

In September, 1997 depositions noticed and commenced by Matassarin were continued at the request of the Defendants to the first week in October, 1997. On October 1, 1997 Defendants moved to amend their prior answers to include claims for attorneys' fees. No claim had been made by the Defendants for fees from the time their first answer(s) filed in July, 1996 until October 1, 1997. On October 2, 1997 they filed Motion(s) for Summary Judgment of Matassarin's remaining ERISA claims. Matassarin was required to respond to the motions within eleven days. She made a request for time to complete the discovery commenced in September, prior to having to respond. Her request was denied by Judge Prado.

No Scheduling Order was ever entered in the case, despite the Judge having required the parties to submit a proposed order in October, 1996. Instead of entering a scheduling Order the Judge elected to commence the granting of a series of Summary Judgments filed by Defendants four weeks after discovery opened in the case, effectively giving Matassarin only eight weeks to produce the evidence necessary to adequately respond to the motions. Despite repeated requests for reasonable time, Matassarin was denied the time to complete --- or rather ---commence discovery. As a result

Matassarin's Federal and State Securities claims were dismissed in November 1996 and January, 1997.

Matassarin's Motion for Class Certification was denied in November, 1997 because Judge Prado found that she was an unsuitable representative because, in essence, he found her to be a "vindictive divorcee", without the benefit of any evidence supporting such a conclusion. Matassarin was ordered by Judge Prado to re-plead her case in April, 1997, with a specific proviso that she not add any new causes of action, despite the fact that the statute of limitations had not run.

Matassarin's Jury Demand was stricken by Judge Prado in an Order dated June 16, 1997, but which was not forwarded to Matassarin for nearly three weeks. The Jury Demand issue was important because Matassarin had been ordered into mediation on the Defendants' motion in May, 1997. The Order Striking the Jury Demand found that a jury trial was not warranted because the ERISA dispute was most analogous to a "contract" dispute, which the Court found under the common law to be a suit in "equity" and not in "law". Matassarin had thoroughly briefed her position in support of a jury trial which included specific Supreme Court authority clearly establishing that a suit analogous to a "contract" dispute is a suit in "law", not a suit in "equity". Matassarin was concerned (1) that the Order had not been forwarded to her in a timely manner and (2) that the Court was using incompetent legal interns for review of the issues presented. She called the Clerk's office , as she had been instructed to do, to inquire as to the processing of the pleadings in the case. She was ultimately referred to the Judge's law clerk, who informed her that no interns were utilized by the Court. This was contrary to an assertion made to Matassarin by Judge Prado's deputy clerk, who had just informed Matassarin that an "intern had worked on the

order". The Law clerk became hostile when Matassarin brought the discrepancy to his attention. He agreed that the Order needed to be "nunc pro tunced", and a new order was drafted and filed the same day. It, however, included a note which effectively accused Matassarin of "impugning the integrity of the Court" and which threatened sanctions. See Order Nunc Pro Tunc included herewith at pg. 17a.

Matassarin responded with a Motion to Recuse and an Affidavit of Prejudice outlining the nature and extent of her conversations with the Clerk's office, and which vehemently denied that anything that she said could be construed as "impugning the integrity of the Court." Judge Prado responded with an Order refusing recusal which made specific and repeated references to ex parte , extra judicial communications with unidentified persons, specifically excluding the law clerk, which wrongfully and prejudicially chastised Matassarin. The Order included the following seventeen (17) line note which purported to be an "example" of Matassarin's improper behavior:

> For example, the district Clerk's office has complained that when the Plaintiff filed her Motion for recusal, she also demanded to file an unattached "Affidavit of Prejudice." The intake clerk, according to reports given to this Court, informed the Plaintiff that unattached affidavits were not accepted by the District Clerk's Office. Apparently, an argument ensued, the result of which was that the intake clerk accepted the Affidavit in order to terminate the conversation with the Plaintiff. So upset was the intake clerk by the Plaintiff's behavior that she immediately reported it to a coworker, left a note for the courtroom deputy regarding this matter, and left a number so that she could be contacted while on

> vacation regarding this matter. While the Court at this time will make no findings regarding the incident in question, the Court will note that rude behavior has caused the Fifth Circuit to forbid without any sort of evidentiary hearing contact with the clerk's office . . .
> (See Order denying recusal included herewith at pg.10a).

Matassarin responded with a Petiton for Writ of Mandamus which was denied by the Fifth Circuit. She subsequently filed a Motion for Rehearing including specific commentary from the Federal Rules of Civil Procedure which supported her position, which was held by the Fifth Circuit for nearly eight weeks, until after Matassarin's suit was dismissed by the District Court Judge, and then denied.

Matassarin's remaining ERISA claims were dismissed on Summary Judgment on November 10, 1997 effectively ending her suit. Within two weeks, the Defendants filed Motions requesting fees. In December, 1997 Matassarin filed her Notice of Appeal.

Briefing commenced in the initial Matassarin I appeal in April, 1998. At about that time, Ms. Lucy Webb of Fulbright & Jaworski, L.L.P., San Antonio, entered counsel, called Matassarin and offered to withdraw their fee request if Matassarin would agree to dismiss the appeal. Matassarin refused.

On May 8, 1998, after sitting on Defendants' fee request for over five months, Judge Prado finally entered an order allowing fees in the amount of $113,000.00. A copy of the order is included herewith at pg.22a . The Order justified the fee award by finding that Matassarin's suit was "frivolous" and that her Motion to Recuse and subsequent Petition for

Writ of Mandamus, were "frivolous" and citing deterrence as a primary factor.

On February 28, 2000 the Fifth Circuit upheld the fee award finding that Judge Prado had not abused his discretion in awarding the fees, and opining that because Matassarin had not prevailed on any issue on appeal, that the award of fees was proper. The Fifth Circuit failed to acknowledge,much less address, a recent Fifth Circuit opinion, Gibbs v. Gibbs, 167 F.3d 949 (5th Cir. 1999), which expressly ruled that proper consideration of the factors governing ERISA fees will seldom dictate an award of fees against an ERISA Plaintiff. Matassarin petitioned for en banc review once again emphasizing the Gibbs decision as well as other decisions supporting a determination that her suit was not "frivolous". Her motion for En Banc Review was denied on March 31, 2000.

CONSIDERATIONS GOVERNING REVIEW:

Review by the United State Supreme Court is warranted for the following reasons:

1. Matassarin's suit was not "frivolous" because the Fifth Circuit's reasoning in Matassarin v. F.F. Mike Lynch et. al. 174 F.3rd 549 ( 5th Cir. 1999) is:

(A) contrary to: (1) the antialienation and public policy pronouncements set out in Boggs v. Boggs 117 S.Ct. 1753 (1997) and Varity Corp. v. Howe 116 S.Ct. 1065 (1996); (2) the antialienation pronouncements of Guidry v. Sheet Metal Workers Nat. Pension Fund, 39 F.3d 1078 (10th Cir. 1994); (3) the investment diversification requirement and fiduciary responsibilities reiterated in Metzler v. Graham 112 F.3d 207 (5th Cir. 1997) and In Re Unisys Savings Plan Litigation 74 F.3d 420 (3rd Cir. 1996); (4) the accrual and vesting

provisions relating to "defined contribution plans" considered in Izzarelli v. Rexene Products Co. 24 F.3d 1506 (5th Cir. 1994); (5) the Fourth Circuit's reasoning in regard to the qualified status of "QDROs" in Fox v. Fox, 167 F.3d 880 (4th Cir. 1999); the Third Circuit's reasoning in regard to the qualified status of "QDROs" in Samaroo v. Robichaud, 193 F.3d 185 (Third Cir. N.J. 1999); (6) the Federal preemption mandate outlined in all of the above and by the Sixth Circuit in Smith v. Provident Bank, 170 F.3d 609 (6th Cir. 1999); and (7) the Tax Reform Act of 1986, 26 U.S.C. § 1 et. seq. (1994 & Supp. 1997) amending ERISA section 206(d)(3)(H)(i) [29 U.S.C. § 1056(d)(3)(H)(i)]. See George P. Escobedo, Casenote, "Beneficiary Beware": New Directions from Matassarin v. Lynch for Those with Qualified Domestic Relations Orders, 31 St. Mary's L.J., 847 (2000) a copy of which is included herewith as a lodging; and

(B) The Fifth Circuit's decision in Matassarin I, supra is contrary to: (1) the Fifth Circuit decision in Vega v. National Life Insurance Services, Inc. et. al., 188 F.3d 287 (5th Cir. 1999) because Matassarin I found that Matassarin's claims should be remanded to State court and/or were governed by State law, whereas the Vega court opined that ERISA 29 U.S.C. § 1132 claims are completely preempted by federal law; (2) Giles v. NYLCare Health Plan Inc. , 172 F.3d 332, 336-337 (5th Cir. 1999) again where the Fifth Circuit found that ERISA §502 " . . . by providing a civil enforcement cause of action, completely preempts any state cause of action seeking the same relief, regardless of how artfully pleaded as a state action.", contrary to the Matassarin I court's reasoning that state law trumps ERISA and/or that Matassarin should seek a remedy in State Court; (3) Rhorer et. ux., v. Raytheon Engineers and Constructors, Inc., 181 F.3d 634,642 (5th Cir. 1999) wherein the Court found that a two step approach was to be utilized in assessing the degree of discretion to be

afforded conflicted plan administrators and Spacek v. Maritime Ass'n, 134 F.3d 283,298 n.14 (5th Cir. 1998) which opined that an administrator's interpretation is de facto arbitrary and capricious if it advances the conflicting interests of the fiduciary at the expense of the affected beneficiary unless the fiduciary justifies the interpretation, whereas in Matassarin I, the Court failed to address the conflict of interest and self dealing evident in connection with the valuation and distribution of the benefits at issue, but rather opined that virtually any interpretation advanced by the administrators must be affirmed regardless of self dealing and the profit derived by the administrators at the expense of the beneficiaries.

2. The Fifth Circuit decision upholding the unprecedented fee award against Matassarin is contrary to the express statements of the circuit in Gibbs v. Gibbs, 167 F.3d 949 (5th Cir. 1999) in which the Court found that proper assessment of the factors governing a fee award under ERISA will seldom dictate fees against an ERISA plaintiff. The panel failed to consider this important precedent in affirming the award of fees against Matassarin, a blatant disregard for existing law, thus denying Matassarin Equal Protection.

3. The Fifth Circuit has consistently failed and refused to address the number and extent of Judge Prado's writings indicating ex parte, extrajudicial, communications with unidentified persons, or his failure to enter a scheduling order, or his failure to allow reasonable discovery prior to commencing the granting of summary judgments, or his unlawful threats of unjustified sanctions, or his express limitations on the extent of Matassarin's suit or his gender biased conclusions. The Circuit has repeatedly ignored the offending actions and as a result Matassarin has been denied Due Process and Equal Protection.

## ARGUMENTS AND AUTHORITIES:

I. The Federal Judiciary is in jeopardy of losing its credibility concerning its willingness to adequately "police" its own.

II.

It is fundamental to this Democracy that a competent, and impartial federal judiciary be available to its citizenry. The Constitution demands it ---- the public demands and deserves it. Federal Judges were given life time tenure for the express reason of removing them from the politics associated with obtaining and maintaining the powerful and thus coveted position of one who is granted the authority and the privilege of sitting in judgment of others. It was anticipated that a person appointed for lifewould best safeguard the individual protections so cherished by our society. It was assumed that such a person would be immune from the influence of money and power welded by the mighty -- most often at the expense of the meak. The federal judiciary was to be the safeguard of the individual protections guaranteed by our Constitution. Federal judges were intended to be the "guarantors".

Yada, yada, yada. Much lip service has been given by the politicians and the courts to the notion that this system continues to be the "best in the world" and that our Constitution works to ensure that the system maintains the integrity with which it was originally imbued. The fact is, however, that the reality is too frequently --- much too frequently at odds with the ideal. The words of the Constitution in and by themselves do nothing. There is no magic attendant to the words --- the language. The magic happens when the power of the words is made manifest by the actions of the courts and the people who sit in them. Dedication to the ideal is what works to transform the words of the Constitution into a reality which protects and promotes the wellbeing of each individual in this society.Conversely,

desecration and utter destruction of the ideal is made manifest when those charged with promoting Constitutional protections choose to ignore not only their Constitutional mandate, but choose to disregard precedent or selectively enforce it.

Three of Judge Prado's written Orders reflect that he engaged in ex parte, extra judicial communications with unnamed persons which were pejorative, wrongful and demeaning toward Petitioner personally. The first was a "Show Cause" order threatening dismissal of Petitioner's suit in November, 1996. See a copy included herewith at pg. 19a. The Judge ordered that Petitioner make application for admission to the Western District of Texas. She complied with his Order in a timely manner. Yet, the Judge issued an Order which set out that " . . . it had come to the Court's attention" that she had failed to comply. Clearly, the Judge was saying that he had been informed by some unidentified person that Matassarin had disregarded his order. It is also clear, that Matassarin had complied with the Court's directive. Nonetheless, the "Show Cause" order unjustifiably threatened dismissal of her suit. The wrongful communication between the Judge and the unidentified third person clearly planted the seed for a hostile environment within which Matassarin was forced to litigate. Once the Judge issued the "Show Cause" order, and perhaps more importantly, once it was shown to be erroneous, the litigation climate was thickened.

The second offending Order came about as a result of an inquiry by Petitioner to the Clerks office concerning a three week delay in sending an Order to her which struck her jury demand. The Order specified that Petitioner had been "rude" to Court personnel and that she had "impugned the integrity of the Court", an allegation which required an immediate response. Petitioner vehemently denied that she had been

rude and denied that she had impugned the integrity of the Court. See a copy of the Order at pg. 17a. The Order clearly reflects that, yet again, the Judge engaged in ex parte, extra judicial communications with unnamed persons and that the communications were pejorative, personally demeaning, wrongful, prejudicial and once again erroneous. It is quite apparent that when a mistake is brought to the attention of those responsible, retaliation is the order of the day. Once again unjustified threats were made against Matassarin personally and against her suit.

The third is an Order refusing recusal. It contains a seventeen line note which cites, yet again, an ex parte, extra judicial discussion with an unnamed person which is wrongful, pejorative and demeaning. The body of the Order also makes reference to several other similar conversations between the Judge and unnamed persons. Unbelievably, the Order threatens elimination of Matassarin's access to the clerk's office, and thus to the Courts, "without evidentiary hearing."

Edgar v. K.L. 93 F.3d 256,259 (7th Cir. 1996) citing Liteky v. U.S. 114 S.Ct. 1147 (1994) opined that secret conversations in chambers may be deemed extrajudicial and support a bias and prejudice argument.

> "As for the question whether information secured in chambers can be "personal"knowledge: although §455 is principally concerned with knowledge that is "extrajudicial" in the sense that the judge acquires it outside a courthouse, see Liteky v. United States 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), the Court rejected the argument that only such information can lead to disqualification. Id. at ____, 114 S.Ct. at 1157. The point of distinguishing between "personal knowledge" and knowledge gained

> in a judicial capacity is that information from the latter source enters the record and may be controverted or tested by the tools of the adversary process. Knowledge received in other ways, which can be neither accurately stated nor fully tested, is 'extrajudicial'."
>
> . . .
>
> ". . . Off-the-record briefings in chambers by contrast, leave no trace in the record . . . " Id. at 259

"Extrajudicial conduct is not conduct arising geographically outside of the courtroom. Rather, it is conduct which arises from something outside of the events of the [courtroom proceeding] itself." Person v. General Motors Corporation, 730 F.Supp. 516 (W.D.N.Y. 1990).

Federal Rules of Civil Procedure 5(e) reads as follows:

> Filing with the Court Defined: The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court . . . The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rule or practice.

19.

The Advisory Committee Notes following the provision pertaining to § (e), Federal Civil Judicial Procedure and Rules, 1996 Edition, states:

> Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is

> not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer . . .

The local rules for the Western District of Texas provide:

> Rule CV-7 PLEADINGS ALLOWED; FORMS OF MOTIONS
> (b) Documents Supporting Motions. When allegations of fact not appearing in the record are relied upon in support of a motion, a summary of the facts relied upon with supporting affidavits shall be filed in an appendix, served and filed with the motion.

Judge Prado's seventeen line note chastising Matassarin for insisting that the intake clerk "file" the Affidavit of Prejudice was not supported by ANY authority. The Federal Rules specify that clerks are not to refuse to accept papers submitted for filing. The commentary to the Rules specifies that a determination as to the propriety of a filing is not a suitable role for intake clerks. The Local Rules for the Western District mandate the submission and filing of supporting affidavits in connection with Motions before the Court. The Clerk's refusal to accept the Affidavit was contrary to the law. Yet, Judge Prado found it acceptable to wrongfully, chastise and demean Matassarin for insisting compliance with the law and threatened denial of her access to the clerk's office , and thus the Courts--- without evidentiary hearing. On what authority? None, because he has the power to do it without any authority.

Judge Prado found that Matassarin was "rude" for having questioned the propriety of an Order striking her jury demand, which later was deemed erroneous and nunc pro tunced. He threatened sanctions for her "rude" behavior without identifying what behavior was deemed "rude" or to whom this behavior was directed.

Judge Prado wrongfully threatened dismissal of Matassarin's suit for failure to comply with his Order concerning admission to the Western District based upon the testimony of an unidentified information source which was wrong.

Judge Prado found that Matassarin was an unsuitable representative for the Class of Defrauded beneficiaries because she was most likely a "vindictive" divorcee most interested in hurting her ex-husband, than in representing the interests of the class. See Matassarin v. Lynch et. al., 174 F.3d 549, 559 (5th Cir. 1999). This conclusion was reached without any evidence whatsoever. The conclusion is not supported by the lengthy published precedent of Matassarin I. Moreover, Matassarin's position was and is supported by voluminous competent authority in the Fifth Circuit, the U.S. Supreme Court, other Circuit Courts and treatises and law review articles. See George P. Escobedo, Casenote, "Beneficiary Beware": New Directions for Matassarin v. Lynch for Those with Qualified Domestic Relations Orders, 31 St. Mary's L.J. 847, (2000) which thoroughly evaluates the case and criticizes the Fifth Circuit opinion as contrary to significant authority, including specific provisions of the Tax Code and ERISA and which summarizes the Fifth Circuit's analysis as an "egregious misinterpretation" (pg. 863); condoning "alienation of Matassarin's retirement benefit in violation of ERISA's anti-alienation provision" (pg. 864); contrary to the fiduciary duties imposed by numerous other Courts, including this Court (Pg. 866); criticized the opinion

as removing a QDRO beneficiary's benefit from the ambit of ERISA protections (pg. 868) ; explains how the opinion will generate a multitude of suits (pg. 868-869) and concludes that ERISA beneficiaries cannot rely on the Courts to protect their interests(pg. 870).

The question is whether Judge Prado would have behaved in the same manner if Matassarin had not been a female solo practitioner. Would Judge Prado accuse Gerry Spence or Alan Derschowitz of being "rude" and threaten sanctions? Would he refuse them adequate time for discovery or order them to re-plead their case -- and limit what causes of action they could bring? Would he chastise them on the record for insisting that an intake Clerk comply with the law? Would he sanction them with fees for filing a "frivolous" action when the law existing at the time of the filing of the case, not to mention law promulgated during and after the dismissal, continued to support their positions?

Judge Prado demonstrated a pattern of bias and prejudice and documented that pattern in writing. The pattern culminated in an unprecedented fee award against Matassarin in an amount in excess of $113,000.00. He cited "deterrence" as a factor justifying the award. The "deterrence that he sought to invoke, however, was not the filing of legitimate ERISA claims based upon competent and voluminous authority, rather it was the deterrence to filing Petitions for Writs of Mandamus seeking to curb his unethical behavior. The message is clear --- file a mandamus and your going to get nailed. He even cited the "mandamus" as a basis for the award. The problem is, the filing of a mandamus action is not one of the factors applied by the Fifth Circuit (and other circuits) in accessing fees in an ERISA action. Does he have the "authority" to use the threat of fees as a basis for protecting his actions from appellate scrutiny? No, but again, he apparently doesn't need any.

The Fifth Circuit has consistently refused to address the clear and undeniable evidence of bias and prejudice. Instead, the appellate panels have chosen to ignore the evidence of bias and simply affirm the award as within the discretion of Judge Prado based upon the ridiculous premise that the litigation was "frivolous" and thus not supported by law and fact. Unbelievably, the Fifth Circuit affirmed the fee award on the basis of "frivolousness" even though the Matassarin I panel opined that because of the "opaqueness" of the DRO at issue that Matassarin may reasonably have questioned the treatment of her account (Id. pg. 564); they recognized the aberrance and difficulty of her situation (Id. pg 568); and addressed the significant issue of how to apply a "Q"DRO which appears out of line from the greater goals of ERISA, and in doing so established new precedent in the Fifth Circuit.

Ignoring Judge Prado's repeated constitutional and ethical violations does nothing but undermine the integrity of this system. The appellate panel didn't even make an attempt to distinguish Judge Prado's errors. Rather, it is simply easier --- and more palatable to affirm a clearly erroneous award of fees --- rather than upset the "powers that be". Ignoring Judge Prado's blatant writings and his biased omissions only works to ensure that such behavior will continue, if not escalate in the future.

Judge Prado made a rash, erroneous and premature decision about the direction this litigation would follow. His actions and omissions ensured that his predetermined destination would be reached. He assumed that the case would be "settled" or "dismissed" and that would be the end of it. He assumed that the blatant evidence of bias and prejudice would never be reviewed by an appellate

panel or that an appellate panel would ignore it. He was right.

The federal judiciary should not make the mistake of assuming that because they affirm an erroneous decision, or fail to address and remedy ethical violations, that the public is convinced that no error occurred. There is an ever growing consensus in this country that the federal government cannot be trusted --- and unfortunately the federal judiciary is included in that mistrust. People are losing faith in the judicial system. If this case is a sterling example of the care, competence and independence of appellate review in the Fifth Circuit --- then we are all in allot of trouble. Matassain only thanks God that the order "reviewed" was not one sentencing her to death. She greatly fears, however, that the quality of appellate review in death penalty cases is no better than what occurred in her case.

The St. Mary's law review article hit the nail on the head. The citizens of the states of Texas, Mississippi and Louisiana cannot rely on the courts to protect their ERISA pension benefits. It is clear from a multitude of other cases that Congress intended for the courts to do just that. Doesn't the law mandate that the federal judiciary is to enforce Congressional legislation? Doesn't the Constitution mandate that litigants are to receive complete, fair and impartial review of the matters presented to the courts? The sanctioning of Matassarin for daring to bring to appellate attention the bias and prejudice of Judge Prado is a clear message that the Fifth Circuit judiciary has lost sight of and passion for the Constitutional ideals that men have given their lives to uphold for the past 225 years. It is abundantly clear that the "fraternity of judges" is of greater importance that the law of the land.

III. The Constitutional mandates of "Due Process" and "Equal Protection are mere legal fictions in the Fifth Circuit.

IV.

Equal Protection of the law means that each individual may contemplate that existing law will be applied to them regardless of their social, economic, religious, or political status. It is a great concept and imperative in a Democracy. The problem is, in practice it is becoming extinct. This case is a prime example.

Just a few months prior to considering the issue in this instance the Fifth Circuit entered an opinion addressing the propriety of a fee award against an ERISA plaintiff in Gibbs v. Gibbs 167 F.3d 949 (5th Cir. 1999). The Gibbs plaintiff wife was under suspicion for having murdered her husband at the time that she was attempting to obtain ERISA benefits. Apparently, her position was not supported by fact or by law. The District Court awarded fees against her and she appealed. The Fifth Circuit in reversing the fee award noted the

> "conspicuous absence of any case citation . . . wherein a defendant was awarded costs and attorney's fees under ERISA. The reason is obvious. Such awards to the defendant are rare. (Id. pg 952)

The Court further noted that there was no presumption for the award of fees to a prevailing party in this circuit and that consideration of the appropriate factors will seldom dictate an assessment of attorney's fees against ERISA plaintiffs. Matassarin cited the case in her direct appeal and in her petition for en banc review. The Appellate panel, however, neglected to even address the case in its decision affirming Judge Prado's fee award against her.

The law in the Fifth Circuit is that ERISA plaintiff's will seldom be assessed fees ---- even in a case where the wife is suspected of having murdered her spouse. Why was the "law" not applied to Matassarin? Certainly, her "behavior" was not more egregious than Ms. Gibbs. The only distinction that makes any sense is the fact that Matassarin filed a Petition for Writ of Mandamus challenging Judge Prado's prejudicial behavior --- and Ms. Gibbs did not. In any event Matassarin was denied the equal protection of the law of the case of Gibbs. The appellate panel didn't even attempt to distinguish Gibbs--- they chose to simply ignore it -- just like they chose to simply ignore the consistent and repeated evidence of bias and prejudice. Due Process contemplates a fair, complete and impartial review and application of the law in a fair and consistent manner.

The Fifth Circuit sitting En Banc decided a case four months after the Matassarin I opinion. In Vega v. National Life Insurance Services, Inc. et. al., 188 F.3d 287 (5th Cir. 1999) the full court opined:

> "There are two kinds of preemption under ERISA.
>
> There is complete preemption -- where there is federal jurisdiction because ERISA contains specific enforcement provisions for the claim, see 29 U.S.C. § 1132, and thus occupies the entire field . . . In this case, the cause of action is completely preempted because 29 U.S.C. § 1132 provides an enforcement mechanism for claims to be brought (1) by a participant or beneficiary -- (B) to recover benefits due to him under the terms of the plan. . . ."
> Id. note 4.

Matassarin I found that Matassarin was bringing 29 U.S.C. §1132 claims. Matassarin I at pg. 563.
Yet, the court also found that Matassarin should take her claims for misdealing to state court for redress. The Vega court cited Giles v. NYLCare Health Plan, Inc., 172 F.3d 332 (5th Cir. 1999) which opined :

> "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character . . . Section 502, by providing a civil enforcement cause or action, completely preempts any state cause of action seeking the same relief, regardless of how artfully pleaded as a state action."
> Id. at 336-337.

What happened in Matassarin I ? The Fifth Circuit found before the decision in Matassarin I, in Giles, that Congress completely preempted 29 U.S.C. § 1132 claims (the same type of claims brought by Matassarin) and that any "state action" seeking to obtain a 29 U.S.C. § 1132 remedy is completely preempted by federal law regardless of how "artfully" it is pleaded. Hmmm. The Fifth Circuit decided before and after Matassarin I, that §1132 claims are preempted federal claims, yet, the Matassarin I panel found that Matassarin should take her §1132 fiduciary self dealing and fraud claims to state court. To further confuse the matter, the Fifth Circuit then upheld a fee award against Matassarin for bringing an action not supported by law or by fact. Hmmm. It doesn't take a legal genius to see that unique "law" has been applied to Matassarin's claims. Law which is not applied to other claims of the same nature. How in the world can Matassarin be sanctioned for bringing a cause of action supported by the Fifth Circuit before and after her case? The answer is simple. The Fifth Circuit doesn't need

"authority" to uphold an unjust fee award against Matassarin. Federal judges have the "power" to do as they please. Unless and until some appellate authority requires that their actions be in compliance with precedent and Constitutional mandate, litigants are simply at their mercy.

To further convolute the matter, the Fifth Circuit clarified the approach to determining the degree of discretion to be afforded "conflicted" plan administrators in Rhorer et. ux, v. Raytheon Engineers and Constructors, Inc. 181 F.3d 634,642 (5th Cir. 1999) opining:

> " . . . this Court uses a unique two-step approach to apply the abuse of discretion standard, and
> 29.
> contra proferentem may properly be used under the first step."

Rhorer cited Spacek v. Maritime Ass'n, 134 F.3d 283, 298 n.14 (5th Cir. 1998) which opined :

> " '[A] wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary unless the fiduciary justifies the interpretation . . . '"

Again, before and after Matassarin I, the Fifth Circuit determined that proper analysis of the deference to be afforded "conflicted" plan administrators involved looking at something beyond their unilateral interpretations. Matassarin presented clear evidence that Lynch demanded $50.25 for his stock, but then six months later told segregated investment account holders that their stock was worth only $22 to $33 per share. It was also made clear that all of the fiduciary

defendants were allowed to purchase part of the 13,000 shares belonging to the segregated investment account holders at the lower price, when the Defendants knew the stock was worth substantially more than what they were paying for it.

Such a deal! Buy $50 stock for half price! In addition, the buy out saved Lynch and Oatman, owners of Great Empire, hundreds of thousands of dollars, by funding the repurchase at half the value of the stock.

The Matassarin I panel failed to apply the analysis dictated by Rhorer or Spacek. Instead of mandating that the Defendants justify their actions --- their interpretation, the panel simply noted that the Defendants' reasoning for failing to apply the clear mandate of the Plan documents to Matassarin's benefit --- was "not self evident." Id. at pg. 564.

Once again, why is Matassarin being sanctioned with fees for filing a frivolous case, when she would have prevailed if the Fifth Circuit had applied the standard for discretion review mandated by Spacek, a case decided prior to Matassarin I, or Rhorer, a case decided after Matassarin I? It is painfully apparent, again, that unique law was applied to Matassarin. Law which was contrary to existing Fifth Circuit precedent prior to her appeal, and after her appeal.

Matassarin was denied equal application and thus equal protection of the law. Due Process mandates that fair, impartial magistrates grant her a full, complete and fair opportunity to litigate her case and that she be afforded the complete and consistent application of the law. She was denied Due Process and Equal Protection.

## CONCLUSION:

By reason of the above and foregoing, Petitioner respectfully requests that this Court grant certiorari to review the important issues presented.

Respectfully Submitted:
Patricia J. Matassarin, Esq.
San Antonio, Texas 78230

(Any footnotes trail end of each document)

PATRICIA J. MATASSARIN, Individually, for an on behalf of the Great Empire Broadcasting Employee Stock Ownership Plan and its Beneficiaries; for and on behalf of that class of persons, participants and/or Beneficiaries of The Great Empire Broadcasting Employee Stock Ownership Plan, past or Present, Defrauded,, Plaintiff-Appellant, versus

F.F. MIKE LYNCH, Individually and as Trustee for The Great Empire Broadcasting Employee Stock Ownership Plan (ESOP); MICHAEL C. OATMAN, Individually and as trustee for The Great Empire Broadcasting Employee Stock Ownership Plan (ESOP); DANNY E JENKINS, Individually and as a former Trustee of the ESOP and Agent of the Trustees and Agent of the Administrator of The Great Empire Broadcasting Employee Stock Ownership Plan; GREAT EMPIRE BROADCASTING, INC., Individually and as a Plan Administrator Individually and as Trustee for The Great Empire Broadcasting Employee Stock Ownership plan (ESOP), and The Great Empire Broadcasting Employee Stock Ownership Plan "Administrative Committee"; KAREN K. WARNER, CPA, Individually, and as a member of The Great Empire Broadcasting Employee Stock Plan "Administrative committee';, UNKNOWN MEMBERS OF THE 'BOARD OF DIRECTORS' of the The Great Empire Broadcasting Employee Stock Ownership Plan; MENKE & ASSOCIATES, INC.,; DON T BUFORD; CURTIS W. BROWN, Defendants - Appellees.

Case No. 98-50473
Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Before HIGGINBOTHAM, DeMOSS, and STEWART, Circuit Judges
PER CURIAM:

Patricia Matassarin appeals the district court's award of $113,200.75 in attorneys' fees to the defendants. For the following reasons we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts of the present case were thoroughly outlined by this court in Matassarin v. Lynch, 174 F.3d 549,555(5th Cir. 1999), cert. denied, ___S.Ct.___, 2000 WL 29385 (2000) ("Matassarin I"). Patricia Matassarin brought suit against the Great Empire Broadcasting, Inc. ("Great Empire") employee stock ownership plan ("ESOP" or "Plan") and its fiduciaries and author. Id. at 556. The Great Empire ESOP is subject to the Employee Retirement Income Security act of 1974 ("ERISA"), 29 U.S.C. §§1001 et seq. Id. Until 1988, appellees Mike lynch and Michael Otaman owner 75 and 25 percent of Great Empire, respectively. Id. Great Empire established the SOP effective January l, 1888, by document executed on October 21, 1988, in order to Distribute Lynch's and Oatman's shares more widely among Great Empire employees. Id.

Appellant Matassarin was married to appellee Danny Jenkins, Great Empire's chief financial officer and a participant in the Great Empire ESOP, until the couple divorced on October 15, 1991. Id. Jenkins and Matassarin entered into a qualified domestic relations order ("QDRO") in which Jenkins agreed to assign Matassarin one-half of his interest in the Great Empire ESOP. Id. Great Empire would hold Matassarin's interest in a segregated account, where it would Accrue interest at the rate of a one-year certificate of deposit. Id.

When Great Empire restated its Plan on December 15, 1994, Michael Oatman sent a letter to everyone who had a segregated account under the original Plan. Id. Most of the segregated-account holders, approximately sixty-seven people, were Plan participants who had left Great Empire's employment and had accounts established pursuant to the Plan § 14(h). Id. The letter states that the ESOP administrative committee had authorized lump-sum distributions to segregated-account holders. Id., at 557. The letter offered distributions either in cash or in shares of great Empire stock. Matassarin contends that she never received this letter, and in any event she did not respond to it. Id. The appelles later contended after the filing of the suit that Matassarin, unlike other segregated-account holders, was not entitled to any distribution and was sent Oatman's correspondence only in error. Id. according to the appellees, § 18(e)(4) in both he original and the restated Plan provides that the Plan need not offer Matassarin any distribution until Jenkins is eligible for retirement. Id. Section 18(e)(4) states: "In the case of any payment to an Alternate Payee before a Participant has separated from service, the Plan shall not be required to make any payment to an Alternate Payee prior to the date Participant attains (or would have attained) the Earliest Retirement Age." Id.

On May 9, 1996, Matassarin brought suit in the United states District Court for the Western District of Texas against Lynch, Oatman, Jenkins, Great Empire, Warner, Menke & Associates, and unknown members of Great Empire's Broad of Directors. She alleged that the defendants committed common-law fraud and violated ERISA, federal securities laws, and state securities laws.

Matassarin filed a motion for class certification, with herself as the representative plaintiff, which the district court

denied. Id. She then filed a motion to have her suit treated as a shareholder's derivative action, or alternatively for joinder, or alternatively for reconsideration of the district court's decision denying class certification. Id. The district court denied this motion. Id. The district court then granted partial summary judgment against Matassarin on her federal securities claims. Id. The court next granted partial summary judgment for all of the defendants on Matassarin's fraud, conversion, and state securities claims. Id at 558. The court thereafter stuck Matassarin's jury demand and, in two separate orders, granted summary judgment for the defendants on Matassarin's ERISA claims, effectively ending her suit. Id.

Matassarin also filed a motion requesting that Judge Prado, the presiding judge, recuse himself from the case on the basis of alleged bias. Id., The judge denied the motion and Matassarin petitioned this Court for a writ of mandamus directing Judge prado to recuse himself. Id. A three-judge panel of this Court denied the petition and Matassarin's subsequent motion for rehearing on the issue. Id.

Both Matassarin and the defendants filed motions seeking to recover attorneys' fees. The district court denied Matassarin's motion, but finding Matassarin's ERISA suit "frivolous," awarded more than $24,000 in attorneys' fees to Menke & Associates and more than $88,000 to the other defendants.

Matassarin then appealed the district court's refusal to certify her proposed classes; the grants of summary judgment on her ERISA and securities claims, the striking of her jury demand; Judge Prado's refusal to recuse himself; and the denial of her motion for attorneys' fees. This court affirmed the district court's ruling in all respects. Id., at 571. The district court awarded attorneys' fees to the defendants after

Matassarin filed her first notice of appeal in the underlying action. Therefore, in the present case Matassarin only challenges the award of attorney's fees to the defendants.

DISCUSSION

On appeal Matassarin argues that the district court erred in awarding attorneys' fees in excess of $113,000 to The defendants. Specifically Matassarin contends that her ERISA arguments in the underlying action were not frivolous. Matassarin further contends that the district court incorrectly weighed the factors under ERISA to determine the appropriateness of a fee award. Finally, Matassarin argues that the district court was biased against her throughout these proceedings, and as a result entered the fee award in favor of the defendants.

ERISA § 502(g), applicable both to trial and appeals, provides that "the court in its discretion may allow a reasonable attorney's fee and costs . . . to either party." 29 U.S.C. § 1132(g)(1); Wegner v. Standard Insurance Company, 129 F.3d 814,820 (5th Cir. 1997). We review the district court's decision to award attorneys' fees only for an abuse of discretion. Wegner, 129 f.3d at 921 (citing Todd. AIG Insur. Co., 47 F.3d 1448,1458 (5th Cir. 1995)).

In determining whether to award attorneys fee in an ERISA action the district court should consider the following five factors in its analysis: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing party would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself;

and (5) the relative merits of the parties' positions. Iron Workers Local No. 272 v. Bowen,624 F.2d 1265, 1266(5th Cir. 1980); Wegner, 129 F.3d at 821; Todd, 47 F.3d 1458. "No one of these factors is necessarily decisive, and some may not be apropos in a given case, but together they are the nuclei of concerns that a court should address in applying section 502(g)." Bowen, 624 F.2d at 1256.

In the present case the district court outlined the Bowen factors and considered them in determining whether attorneys' fees were proper in this case. First, the district court found that Matassarin's bad faith in bringing this lawsuit was evidenced by her numerous motions for reconsideration of the court's ruling, her "frivolous" motion to recuse, and the fact that many of her claims were "easily dismissed on summary judgment." In our opinion in Matassarin I, we agreed with the district court's finding in the underlying action that based on Matassarin's pleadings and her behavior during the course of the case it was likely that she wanted to be the representative in a class action against The Great Empire Broadcasting ESOP in an effort to hurt her ex-husband. See Matassarin, I, 174 F.3d at 559. We further found that the defendants made no untrue statements of material facts or false representations in their dealings with Matassarin regarding her plan benefits. Id., at 562. Thus, there is ample support for the district court's finding that Matassarin was acting in some degree in bad faith relative to the defendants when she brought his action.

Matassarin's second major contention is that the district court improperly found that her ERISA arguments in the underlying action were without merit. The district court found "that the plaintiff's position on most ERISA issues in this case had no merit." In Matassarin I, we specifically found that Matassarin's central argument in her federal securities claim in which she argued that her interest in the

ESOP was a security , was "without merit." Id. at 560. While we did acknowledge that due to the "opaqueness" of some of the Great Broadcasting ESOP provision it was nderstandable that Matassarin might question the treatment of her account. Id. at 564. However, we ultimately failed to sustain any of her arguments. Thus, there is no clear evidence to contradict the district court's finding that her argument were without merit. (note 1)

Furthermore, there is no evidence that the district court was biased against Matassarin and thus failed to render an impartial attorneys' fee award. In Matassarin I, we found that Judge Prado's interaction with Matassarin, including his writing of a footnote that ordered all parties in the action to behave in a civil manner, "f[ell] far, far short of' such a high degree of antagonism as to make fair judgment impossible'." Id, at 571.

The district court also concluded that it was without sufficient information to determine whether Matassarin was capable of paying the attorneys fees. However, even assuming arguendo that it may pose an economic hardship for Matassarin to pay the attorneys' fees, this one factor is not decisive in the attorneys' fee determination. See Bowen, 624 F.2d at 1266. Therefore, because the district court carefully applied Fifth Circuit precedent, and we have been presented with no evidence to contradict the court's findings it is clear that the district court did not abuse its discretion in awarding attorneys' fees to the defendants.

AFFIRMED.

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and it is not precedent

except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

note l -

Matassarin has also failed to come forth with any argument to persuasively contradict the district court's finding that its award would deter other from bringing similar actions.

Filed July 18, 1997

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Patricia J. Matassarin, Plaintiff,
Civil Action No. SA-96-CA-0482

v.

F.F. Mike Lynch, individually as Trustee for the Great Empire Broadcasting Employee Stock Ownership Plan et al., Defendants

ORDER DENYING MOTION FOR RECUSAL

On this date came to be considered the Plaintiff's Motion to Recuse, filed July 11, 1997. After carerful consideration, the Court will deny the motion.

Facts and Procedural Posture

On July 7, 1997, the Plaintiff made a telephone call to inquire about "the nearly three week delay in receiving a copy of the Court's order striking her jury demand." See Affidavit of Prejudice, filed July 11, 1997. The Plaintiff spoke with two members of the District Clerk's office, and to a law clerk of the judge hearing this case. As a result of that phone conversation, it became apparent that a typographical error appeared in the order.( note 1).

On that same day, the Court issued an order which corrected the typographical error. In a footnote to that order, the Court warned all parties and litigants that, in the future,

the Court would expect them to treat Court personnel -- including the staff of the District Clerk's Office -- with courtesy and civility, and to not impugn the integrity the court. See Local Rule AT-4, Texas Lawyer's Creed Iv (3). The Plaintiff, based mainly upon this footnote, argues that the law clerk to this Court has improperly shown prejudice against the Plaintiff, and that this basis has rendered this Court incapable of rendering a just verdict. Accordingly, the Plaintiff has moved for recusal.

Analysis

In Sidag Aktiengesellschaft v. Smoked Foods Products Co., 969 F.2d 1562 (5th Cir. 1992), a panel for the Fifth Circuit suggested that, when it appears that attorney acrimony threatens to erupt in rudeness, it is proper for a court to issue gentle warnings about the civility. Faced with some ongoing examples of rudeness, the Sidag court held:

> We caution therefore all counsel involved that any (rude) acts hence forth taken in furtherance of this case, whether remotely or directly related to those with which we deal today, will not be met with so mild and gentle a judgment as the one we now render. To the contrary, instigator(s) will risk exposure to the full panoply of sanctions at our disposal. We trust that shall not prove necessary, our trust being grounded in the assumption that each such attorney is wise, so a word -- or, more accurately in this instance, several words -- should be sufficient.

969. F.2d at 1562-1563. Thus, the language of Sidag provides that, when a court feels that litigants may be contemplating improper behavior, it is within that court's power to remind counsel of their manners.

In the present case, the Court has been informed on three separate occasions by members of the District Clerk's Office that the plaintiff has behaved rudely toward them. (note 2). After two of these complaints (from two separate people), the Court, in a footnote, issued a warning to all parties on their duty of civility:

> The Court at this time will also warn all parties that, in conversations with Court personnel, (including members of the District Clerk's Office), the Court expects parties and lawyers to treat Court staff with courtesy and civility. See Texas Lawyer's Creed, VI(3). In the future, failure of any party or lawyer to conform their behavior to these expectations may result in sanctions. See also Local Rule AT-4 ("No attorney permitted to practice before the Court shall engage in any conduct which degrades or impugns the integrity of the Court[.]")

This footnote, done in the style of Sidag, did not constitute a finding of fact against any party. Instead -- like the language of Sidag -- it merely warned all parties to behave like professionals.

Despite the Plaintiff's belief to the contrary, no law clerk to this Court has ever suggested that the Plaintiff was personally rude to him or impugned to him the integrity of the Court. Additionally, the Plaintiff has no personal knowledge sufficient to support her assertion that a law clerk to this Court has ever made any representations whatsoever about her July 7 phone conversation with him -- and indeed, no such representations have ever taken place. (Note 3) Even the complained-of footnote does not accuse the Plaintiff of impugning the integrity of the Court; at most, it can be read to suggest that Ms. Matassarin may have been rude to

members of the District Clerk's Office. The gentle nature of the Court's reminder, the fact that two employees of the District Clerk's Office have complained about the Plaintiff's behavior, and the apparent lack of animus on the part of the Court's law clerk, all lead this court to conclude that no bias, extrajudicial or otherwise, has been shown again the Plaintiff. See Sidag (established that the complained-of footnote is not an unusual warning); In re Hipp., Inc., 5 F.3d 109 (5th Cir. 1993) ("Disqualification is appropriate if a reasonable person, knowing all of the relevant circumstances, would harbor doubts about the judge's impartiality. Adverse rulings against the defendant in the same or a prior judicial proceeding do not render the judge biased.") see Also, Travelers Ins. Co., v. St. Judge Medical Office Bldg., Ltd. Partnership, 843 F. Supp. 138, amended 154 F.R.D. 143 (E.D.La. 1994) (holding that bias must stem from extrajudicial source and result in opinion on merit on some basis other than what judge learned from his participation in the case.); Person v. General Motors Corp, 730 F. Supp 516 (W.D.N.Y. 1990) (defining extrajudicial to mean conduct which arises from something outside of court proceedings).

Stated briefly, the Court must conclude that, even if all properly-pled facts in the affidavit of prejudice are considered true, the plaintiff still has filed to show that this Court or its law clerk bear any bias against her. The Court, through these judicial proceedings, has received complaints that the plaintiff has been rude to members of the District Clerk's Office; these complaints led the court to issue a general warning to all parties not to be rude to Court personnel. The Court has made no findings of fact with regard to the Plaintiff and her interactions with the District Clerk's Office. It is impossible, given these set of circumstances, to reasonably conclude that the Court has treated the Plaintiff differently than it would treat any other litigant. Accordingly, it is hereby ORDERED that the motion for recusal is DENIED.

SIGNED and ENTERED this 16th day of July 1997.

Edward C. Prado
United States District Judge

---

note 1 -

The typographical error was that the Court's order appeared to have been signed on June 16, 1997, when it actually was signed on June 30, 1997.

note 2 -

For example, the District Clerk's Office has complained that when the Plaintiff filed her motion for recusal, she also demanded to file an unattached "Affidavit of Prejudice." The intake clerk, according to reports given to this Court, informed the Plaintiff that unattached affidavits were not accepted by the District Clerk's Office. Apparently, an argument ensued, the result of which was that the intake clerk accepted the affidavit in order to terminate conversation with the plaintiff. So upset was the intake clerk by the Plaintiff's behavior that she immediately reported it to a coworker, left a note for the courtroom deputy regarding this matter, and left a number so that she could be contracted while on vacation regarding this matter. While the Court at this time will make no findings regarding the incident in question, the Court will note that rude behavior has caused the Fifth Circuit to forbid (without any sort of evidentiary hearing) litigants from contacting the Clerk's Office by telephone or in person. See Goodman v. Ballou, 1994 WL 792365 (5th Cir. 1994)

note 3-

The Court must accept as true the facts pled in the affidavit of prejudice, and would do so, even if the facts plead in the affidavit were completely false. See U.S. v. Patrick, 542 F.2d 381 (7th Cir. 1975). However, this does not mean that conclusory and speculative allegations -- such as allegations about how this Court operates within its chambers -- need not be accepted as true. See U.S. v. Vespe, 868 F.2d 1328 (3rd Cir. 1989). Furthermore, while judges cannot question the truth or the good faith of the affidavit in support of a recusal motion, the Court may put the facts into their proper context. See McCann v. Communications Design Corp., 775 F. Supp. 506 (D.Conn. 1991).

Filed 7-7-97

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Patricia J. Matassarin,
Plaintiff

Civil Action No.
SA-96-CA-0482

v.

F.F. Mike Lynch, individually and as a Trustee for The Great Empire Broadcasting Employee Stock Ownership Plan, et al.,
Defendants.

ORDER

On this date came to be considered the status of the above-styled and numbered cause.

On July 7, 1997 the Plaintiff informed the Court through a telephone conversation (note 1) with personnel in the District Clerk's office that an order entered by the Court seemed to contain a typographical error. After a review of the record, the Court finds that the Plaintiff is correct. In Doc. no. 145, the date on the document suggests that the order was signed on June 16, 1997. The order should read that it was signed on June 30, 1997. The Court will order this matter corrected.

Accordingly, it is hereby ORDERED that the District Clerk's Office will amend the record to reflect that Doc. No. 145 was signed on June 30, 1997 and filed on July 2, 2997.

SIGNED and ENTERED this 7th day of July, 1997.

Edward C. Prado
United States District Judge

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note 1 -

The Court at this time will also warn all parties that, in conversations with Court personnel (including members of the District Clerk's office), the Court expects parties and lawyers to treat Court staff with courtesy and civility. See Texas Lawyer's Creed, IV(3). In the future, failure of any party or lawyer to conform their behavior to these expectations may result in sanctions. See Also Local Rule AT-4 ("No attorney permitted to practice before the Court shall engage in any conduct which degrades or impugns the integrity of the Court[.]")

Filed Nov 13, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Patricia J. Matassarin, Individually and as Representative of the Great empire Broadcasting Employee Stock Ownership Plan and its participants and beneficiaries and as Representative of those participants and beneficiaries, past or present defrauded,

Plaintiff,

v.

F.F. Mike lynch, Individually and as a trustee for The Great Empire Broadcasting Employee Stock Ownership Plan, et al.,

Defendants.

Civil Action No. SA-96-CA-0482

ORDER TO SHOW CAUSE

On August 29, 1996, the Court entered an Order granting Plaintiff's counsel leave to appear pro hac vice in the above-styled and numbered cause. As part of that decision, the Court further ordered Plaintiff's counsel to make application for admission to practice before the United States District Court for the Western District of Texas within sixty days. It was further ordered that counsel should become familiar with the Local Court Rules of the United States District Court for the Western District of Texas.

It has come to the Court's attention that Plaintiff's counsel has not complied with this Court's Order. Specifically, counsel has made no application for admission to practice before the United States District Court for the Western District of Texas. (note 1) Accordingly, the Court will order that the Plaintiff's counsel will show cause on or before December 5, 1996, why she should not be sanctioned for failure to comply with the Court's Order of August 15, 1996 (sic). A failure to show cause by that date may result in sanctions up to and including a dismissal of the action under Fed. R.Div. Pro. 41(b). Proof of an application for admission to practice in the Western District, filed by that date, will satisfy this order to show cause.

Accordingly, it is hereby ORDERED that the Plaintiff's counsel will SHOW CAUSE on or before December 5, 1996 why she should not be sanctioned for failure to comply with the Court's Order of August 15, 1996 (sic). Failure to do so will result in sanctions, up to and including dismissal of the current action. Filing proof of an application for admission to practice in the Western District on or before December 5, 1996 will satisfy the requirements of this order.

SIGNED and ENTERED this 13th day of November 1996.

Edward C. Prado
United States District Judge

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note 1-

Moreover, Plaintiff's counsel has not complied with Local Rule CV-7(i) (regarding discovery motions) nor CV-16 (regarding the timing of discovery).

Filed May 11, 1998

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Patricia J. Matassarin
Plaintiff,

Civil Action No.
SA-96-CA-0482

v.

F.F. Mike lynch, et al.,
Defendants.

ORDER

On this date came to-be considered the Great Empire defendant's Motion for Award of Attorney Fees, filed November 224, 1997, Defendant Menke & Associates, Inc's Motion for Award of Attorneys' Fees, filed December 4, 1997, and the Motion by Plaintiff Matassarin for Stay pending Appeal, filed December 16, 1997, in the above-styled and numbered cause. After careful consideration, the Court will grant all three motions to the extent described below.

Standards for Awarding Attorneys' Fees

Under ERISA, "The court in its discretion may allow a reasonable attorneys' fee and costs of action to either party." Todd v. AIG Life Ins. Co. 47 F.3d 1448, 1458059 (5th Cir. 1995); 29 U.S.C. § 1132(g)(1). Such an award, as the statue states, is purely discretionary; the Fifth Circuit reviews the district Court's decision only for an abuse of discretion. Todd. 47 F.3d at 1458-59; Salley v. E.I. DuPont De Nemours & Co., 966 F.2d 1011, 1016 (5th Cir. 1992). The court has generally required, however, that the following five factors be

considered in deciding whether to award attorneys' fees to a party under § 1132(g)(1):

> [A] court should consider such factors as the following: (1) the degree of the opposing parties' cupbability or bad faith; (2) he ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing party would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' position.

Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980). While other circuits have asserted that a presumption exists under ERISA in favor of awarding costs and attorneys' fees, that is not the law in the this Circuit. Todd, 47 F.3d at 1458-59; Harms v. Cayenham Forest industries Inc. 984 F.2d 686,694 (5th Cir. 1993)

The Supreme Court has consistently emphasized that the lodestar calculation provides an appropriate, objective basis on which to make an initial estimate of the value of a lawyer's services. See e.g. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 564, 106 S.Ct. 3088, 3097, 92 L.Ed.2d 439 (1986); Todd, 47 F.3d at 1458-59. And this court has approved the use of the lodestar calculation in ERISA cases, even if it has not been explicitly required. Todd, 47 F.3d at 1458-59; See e.g. Salley 966 F.2d at 1017. thus, in an ERISA case, the determination of attorneys' fees requires the district court to apply a two-step analysis. Todd. 47 F.3d at 1458-59. The court must first determine whether the party is entitled to attorneys' fees by

apply the five factors enumerated in Bowen. Id. If the court concludes that the party is entitled to attorneys fees, it must then apply the lodestar calculation to determine the amount to be awarded. Id. This calculation is accomplished by multiplying the number of hours expended on the matters at issue in the case by a reasonable hourly rate. See Delaware Valley Citizens' Counsel, 478 U.S. at 564, 106 S.Ct. at 3097; see also Salley, 966 F.2d at 1017. This two-step analysis in ERISA cases does not permit the award of a percentage of the recovery, such as is customary in contingent fee cases. Todd. 47 F.3d at 145-59. However, while the Court must follow the lodestar method, it may adjust the lodestar upwards or downwards depending on the respective weights of various other factors. Johnson v. Georgie Highway Exp. Inc., 488 F.2d 714,717-719 (5th Cir. 1974)

Analysis

After applying the five Bowen factors, the Court finds that an award of attorneys fees is appropriate in the present case. The plaintiff does not appear to have been motivated by good faith in bringing the lawsuit -- indeed, her conduct in requesting reconsideration of virtually every decision by the Court, her frivolous motion to recuse, and the fact that many of her claims were easily dismissed on summary judgment all point to a lack of faith. The Court has insufficient information upon which to judge whether the plaintiff can satisfy an award of attorneys fees, but an award of attorneys fees clearly would deter other persons from fining similar lawsuits under similar circumstances. The Court further finds that the parties requesting the attorneys fees sought to benefit all of the ESOP plan participants, because they defended the plan from a set of frivolous claims. Finally, the Court finds that the Plaintiffs position on most ERISA issues in this case had no merit.

The Court finds that Joseph P. Friedman of Fulbright and Jaworski, L.L.P., reasonably expended 163.15 hours in defending this action, and that a reasonable fee for a lawyer of his experience is $225 per hour. The Court, using the lodestar method, finds that he should be awarded $36,371.25. The Court further finds that Robert G. Newman and Lucy Frost Webb of this same firm reasonably expended 57.7 hours and 222.2 house, and that reasonable rates for attorneys of their experience are $225 and $175 respectively. Using the lodestar method, the Court finds that these attorneys should be awarded $12,982.50 and $38,885, respectively. In total, therefore, the Court will order to pay to the Great Empire Defendants, $88,238.75. The Court will not at this time award attorneys fees for the appellate action -- those fees are better left to the sound discretion of the appellate court.

The Court further finds that Michael Holland of Menace & Associates reasonably expended 126.6 hours in this litigation, and that the reasonable rate for the work done is $150 per hour, yielding a lodestar calculation of $18,990. (note 1) the Court also finds that Larry E. Gee reasonably worked 29.2 hours at $85 per hour, and that he reasonably worked 34.9 hours at $100 per hour, for a total of $5,972. (note 2) Therefore, the Court will order the Plaintiff to Pay Menke & Associates, $24,962 in attorneys' fees.

Finally, the Court will order that this award of attorneys fees will be stayed pending appeal.

Conclusion

Accordingly, it is hereby ORDERED that the Great Empire Defendant's Motion for Attorneys' Fees is GRANTED IN PART, such that the Plaintiff will pay the Great Empire Defendants $88,238.75. It is further

ORDERED that Menke & Associates, Inc.'s Motion for Attorneys FEEs in GRANTED IN PART, such that the plaintiff will pay that Defendant $24,962 in attorney's fees. It is further ORDERED that the Plaintiff's Motion for Stay is GRANTED, such that the award of attorneys' fees is STAYED PENDING APPEAL.

SIGNED and ENTERED this 8th day of May 1998.

Edward G. Prado
United States District Judge

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note 1-
This calculation does not include the time spent in pursuing a TRO to stop discovery.

note 2-
Mr. Gee was promoted during the time period when this lawsuit was pending, and thus the Court's decision reflects his increasing stature as a lawyer. Also, the time attributed to him does not include any time spent working on the TRO.

Filed 3/31/2000

ON PETITION FOR REHEARING EN BANC

Before HIGGINBOTHAM, DeMOSS, and STEWART
Circuit Judges

Per Curium:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge ein regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and 5th Cir. R. 35), the Petition for rehearing En Banc is DENIED.

ENTERED FOR THE COURT: